Supreme Court, U. S.
FILED
NOV 20 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1607

HARRY R. HUGHES, SECRETARY OF TRANSPORTATION,
STATE OF MARYLAND, ET AL.,

Appellants,

v.

ALEXANDRIA SCRAP CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

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November 1975

The Daily Record Co., Baltimore, Md. 21202

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the District of Maryland, from which the Appellants are seeking relief, is reprinted in the Appendix to the Appellants' Jurisdictional Statement (AJS. la),[1] and

[1] References to the Appendix to the Jurisdictional Statement will be cited as "AJS.," and references to the Appendix to this Brief for Appellants as "A." The pagination in the Appendix to the Jurisdictional Statement is in the form "1a, 2a, 3a, . . .," while that of the Single Appendix is "1A, 2A, 3A, ..."

has been reported as *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46 (D. Md. 1975).

JURISDICTION

The jurisdiction to entertain this appeal from a decision of a United States District Court sitting as a court of three judges, is premised upon 28 U.S.C. § 1253. Probable jurisdiction was noted by this Court on October 6, 1975.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8:

> The Congress shall have Power . . .
>
> . . . .
>
> To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes [.]

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Code (1957, 1970 Repl. Vol., 1974 Cum. Supp.) Art. 66½, § 11-1002.2(f)(5), the statute which the District Court determined was unconstitutional, may be found in the 1975 Cumulative Supplement to Volume 6 of the Annotated Code of Maryland. (The identical statute may also be found in the 1974 Cumulative Supplement to Volume 6.) It reads as follows:

> (5) Notwithstanding any other provisions of this section, any person, firm, corporation, or unit of government upon whose property or in whose possession any abandoned motor vehicle is found, or any person being the owner of a motor vehicle whose title certificate is faulty, or destroyed, or any agent designated and authorized by a unit of government to remove an abandoned motor vehicle from public or private property, may dispose of the motor vehicle to a wrecker or scrap processor without the title and without notification procedures of subsections (a) and (b) of this section, if the motor vehicle is over eight years old and has no engine or is otherwise totally inoperable. In those cases only a scrap processor whose plant is physically located and operating in this State shall execute an indemnity agreement that shall be filed with the Motor Vehicle Administration. The indemnity agreement shall contain the name, address and signature of the person delivering the vehicle. The indemnity agreement and the manufacturers serial or identification number shall be satisfactory proof that the vehicle has been destroyed and shall be acceptable for payment of the full bounty authorized by § 5-205 if the vehicle identified in the indemnity agreement was titled in this State. Otherwise, for the purpose of administering the provisions of this section, the provisions of § 5-205 shall not apply.

QUESTIONS PRESENTED

I. Does either the Commerce Clause or the Equal Protection Clause of the Constitution of the United States compel the State of Maryland to make, out of State funds, bounty payments to non-Maryland scrap

processors in the same manner or to the same extent as such payments are made to Maryland scrap processors?

II. Were the Appellants denied due process of law where material facts were in dispute, and the District Court granted summary judgment in favor of Appellee?

STATEMENT OF THE CASE

Plaintiff-Appellee Alexandria Scrap Corporation (Alexandria), a Virginia corporation, instituted this proceeding in the United States District Court for the District of Maryland seeking injunctive and declaratory relief pursuant to 28 U.S.C. §§ 2281, 2284, 2201, 2202. Named as Defendants, now Appellants, were Harry R. Hughes, Secretary of Transportation, and other officials of the Motor Vehicle Administration of the Maryland Department of Transportation who are charged with administering the statute complained of. Because Alexandria alleged the unconstitutionality of a Maryland statute, a three-judge court was convened to hear the case pursuant to 28 U.S.C. §§ 2281, 2284.

The material facts surrounding this case are relatively simple. In 1969 the Maryland Legislature enacted a bill to provide, *inter alia*, "for the disposal of abandoned motor vehicles, the licensing of wreckers and scrap processors of motor vehicles, [and] the procedure for notifying the Department of Motor Vehicles of the scrapping, dismantling or destroying of motor vehicles," Laws of Maryland 1969, ch. 556. Although the statutory scheme has been altered since 1969, it has remained essentially the same from 1969 until the present. "[T]he legislation was designed to arrest the increasing accumulation of automobile hulks, and to promote their recycling," *Administrator v. Vogt*, 267 Md. 660, 675, 299 A.2d 1, 9 (1973).

The legislative scheme provides for the licensing[2] of scrap processors[3] and automobile wreckers,[4] the payment by wreckers — but not scrap processors — of a semi-annual assessment for retaining possession of automobile hulks ten model years or older which have been in their possession for more than one year,[5] and the payment by the State of Maryland to wreckers and scrap processors of a bounty for the destruction of certain vehicles formerly titled in Maryland.[6]

From the enactment of the original legislation until July 1, 1974, there were basically four methods by which licensed wreckers and scrap processors could lawfully obtain vehicles which, upon their destruction, would entitle the wreckers and scrap processors to

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[2] Maryland Code (1957, 1970 Repl. Vol.) Art. 66½, §5-201.

[3] "'*Scrap processor*' means an establishment having facilities for processing iron, steel and nonferrous scrap metal and whose principal product is scrap iron, steel and nonferrous scrap for sale for resmelting purposes only which is licensed under the provisions of this part." Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §5-201.1(a).

[4] "'*Wrecker*' means every person, firm, or corporation engaged in the business of purchasing or otherwise acquiring vehicles for the benefit of the materials contained therein or parts thereof." Code (1957, 1970 Repl. Vol.) Art. 66½, §5-201.1(b).

[5] Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §5-203(d). The age of vehicles which are subject to assessment has changed over the years. *See* note 21 *infra*.

[6] Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §5-205. In very limited circumstances Maryland will pay a bounty for the destruction of automobiles which have never been titled in the State. These instances arise where a police department disposes of a vehicle which was abandoned within a political subdivision. In these cases the State will pay a bounty to the appropriate county or Baltimore City. Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §§5-205, 11-1002.2.

bounty payments from the State of Maryland. Such vehicles could be received from: 1. A vehicle owner possessing a valid certificate of title;[7] 2. A Maryland police department, after the public auction of the vehicle;[8] 3. Anyone in possession of a valid police certificate of authority to sell the vehicle;[9] and 4. Virtually anyone, without any documentation, in the case of a vehicle eight years of age or older which had no engine or was otherwise totally inoperable.[10]

Since 1970 the Appellee, although a Virginia corporation with its principal place of business in Alexandria, Virginia, has been licensed as a scrap processor by the State of Maryland, and has participated in Maryland's bounty program. In fact, from July 1, 1970, through September 30, 1974, Alexandria received $219,084.00 in bounty payments from the State of Maryland, which represented 13.7% of the total sum of bounty payments received by all wreckers and scrappers during that period. *See* Stipulation of Facts ¶ 13 (A. 60A).

During its 1974 session the Maryland Legislature amended the existing bounty scheme. As a result of the

[7] Code (1957, 1970 Repl. Vol.) Art. 66½, §5-203.1. This section governs the conveyance of title to a wrecker or scrap processor. This can be accomplished either by a vehicle owner delivering the certificate of title to the wrecker or scrapper, or by anyone holding an assigned certificate of title who endorses a reassignment and warranty of that title when transferring the vehicle in question to a wrecker or scrap processor. The latter method is usually employed by wreckers when delivering hulks to scrappers, and the document executed by the wrecker is commonly referred to as a Wrecker's Certificate, which is a form issued by the Maryland Motor Vehicle Administration.

[8] Code (1957, 1970 Repl. Vol.) Art. 66½, §11-1002.2(a).

[9] Code (1957, 1970 Repl. Vol.) Art. 66½, §11-1002.2(f)(1-4).

[10] Code (1957, 1970 Repl. Vol.) Art. 66½, §11-1002.2(f)(5).

passage of House Bill 782, Laws of Maryland 1974, ch. 465,[11] as of July 1, 1974, those scrap processors with a plant "physically located and operating in" Maryland were eligible to receive bounty payments for vehicles eight years of age and older which had no engine or were otherwise totally inoperable, if their acquisition was documented by an indemnity agreement, and the agreement was filed with the Motor Vehicle Administration as a prerequisite to payment.[12] Non-Maryland scrap processors, including Alexandria, were not eligible to receive bounty payments for these vehicles through the execution of an indemnity agreement. These non-Maryland scrappers could receive bounty payments for such eight year old vehicles if they received the vehicles by one of the other three methods, but they could not do so by filing indemnity agreements.

Because the acquisition of these eight year old vehicles had been the easiest and most lucrative method by which Alexandria had participated in the bounty program, Alexandria asserted that the 1974 legislation caused is primary source of bounty revenue to evaporate.[13] Alexandria averred that during the three

[11] Now codified as Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §11-1002.2(f)(5).

[12] By the execution of an indemnity agreement, the person delivering the eight year old vehicle indemnified the scrap processor to whom the vehicle was delivered from all claims which might be brought against the scrapper upon the destruction of the vehicle. Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §11-1002.2(f)(5).

[13] It must be noted that eight year old vehicles which were delivered by wreckers did not have to be accompained by indemnity agreements in order to qualify for bounty payment. The Pennsylvania scrap processors participating in the Maryland program used Wreckers' Certificates instead of indemnity agreements. *See* note 7 *supra*. The use of these Wreckers' Certificates is in no way restricted to use by Maryland based scrap processors.

months prior to July 1, 1974 (April, May, and June, 1974), it had acquired 1,879 vehicles for the destruction of which it had received $30,064.00 in bounty payments. For the next three months (July, August, and September, 1974) after the amending legislation became effective, Alexandria acquired only 27 vehicles which resulted in the collection of $432.00. Affidavit of Isadore Gittleson ¶13 (A. 81A).

Believing that the amended bounty scheme imposed a burden upon its ability to collect bounties, Alexandria instituted suit in the United States District Court for the District of Maryland praying that a declaratory judgment be entered decreeing Code (1957, 1970 Repl. Vol., 1974 Cum. Supp.) Art. 66½, § 11-1002.2(f)(5), unconstitutional as being repugnant to the Commerce Clause and to the Equal Protection Clause of the fourteenth amendment to the United States Constitution, and further praying that Appellants be enjoined from enforcing or administering said statute. Alexandria had also requested that a three-judge court be convened to decide the case, and such a tribunal was designated by The Honorable Clement F. Haynsworth, Chief Judge, Fourth Judicial Circuit. After receipt of Alexandria's Complaint, Appellants filed a Motion to Dismiss.

The cause was heard on February 14, 1975, and on March 12, 1975, the Court handed down its opinion and order. The District Court granted summary judgment for Alexandria, found the Maryland statute to be violative of the Commerce Clause and the Equal Protection Clause of the Constitution of the United States, and enjoined Appellants from giving any force or effect to the words "whose plant is physically located and operating in this State," as they appeared in the statute. This ruling has the effect of allowing non-

Maryland scrap processors to obtain bounty payments for inoperable eight year old vehicles by filing indemnity agreements.

Appellants filed their Notice of Appeal of the District Court's decision on April 25, 1975 (AJS. 32a). The Jurisdictional Statement was filed on June 20, 1975, and Alexandria filed its Motion to Affirm after having secured from the Clerk a time extension until August 6, 1975, to do so. This Court then noted probable jurisdiction on October 6, 1975.

SUMMARY OF ARGUMENT

The District Court erroneously concluded that Maryland's bounty scheme violated both the Commerce Clause and the Equal Protection Clause. Additionally, the grant of summary judgment in favor of Alexandria was procedurally and substantively improper.

Commerce Clause

Far from burdening commerce to an unconstitutional extent, the Maryland statute under review does not place any burden upon interstate commerce. Unlike the situations which existed in the cases cited by the District Court, the Maryland law does *not* prohibit, or even restrict, the interstate movement of scrapped automobiles or scrap metal. The program allows Alexandria, or any licensed non-Maryland scrap processor, unlimited participation in the bounty program. In fact, the scheme actually promotes commerce by artifically enhancing the value of abandoned vehicle hulks in excess of their natural market price. For these reasons, as a matter of law, the Maryland scheme does not offend the Commerce Clause.

Equal Protection Clause

The District Court's ruling that the Maryland statute unconstitutionally denied Alexandria the equal protec-

tion of the laws is erroneous as a matter of law, because the Equal Protection Clause of the fourteenth amendment is inapplicable to the instant case. That Clause provides, in part, that no State shall "deny to any person *within its jurisdiction* the equal protection of the laws," U.S. Const. amend. XIV, § 1 (emphasis supplied). Alexandria is a Virginia corporation, with its principal place of business in Virginia, which is not registered to do business in Maryland, which in fact does not engage in any business in Maryland, and which does not pay any Maryland taxes. Being a Virginian not within Maryland, Alexandria is not entitled to the equal protection of Maryland's bounty law. *See Sully v. American Nat'l Bank*, 178 U.S. 289, 20 S. Ct. 935 (1900); *Blake v. McClung*, 172 U.S. 239, 19 S. Ct. 165 (1898); *see also Missouri v. Canada*, 305 U.S. 337, 49 S. Ct. 232 (1938); *cf. Pennoyer v. Neff*, 95 U.S. 714 (1877).

Even if the Equal Protection Clause were applicable to this case, the Maryland statutory scheme would not abridge it. The manner by which the Maryland law differentiates between Maryland and non-Maryland scrap processors is "rationally based and free from invidious discrimination," *Dandridge v. Williams*, 397 U.S. 471, 487, 90 S. Ct. 1153, 1162 (1970). In 1969 the Maryland Legislature perceived that a problem of statewide proportion was presented by the accumulation of vehicle hulks in auto wreckers' yards. One aspect of the problem involved environmental health, because some hulks had remained undisturbed for so long that they had become infested with rodents, *Administrator v. Vogt*, 267 Md. 660, 670, 299 A.2d 1, 6 (1973); *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 48-49 (D. Md. 1975) (AJS. 3a). In response thereto a comprehensive regulatory program was enacted, one aspect of which was the payment of bounties to encourage the removal of these discarded vehicles. The Legislature was "not subject to a constitutional straightjacket," *Jefferson v.*

Hackney, 406 U.S. 535, 546, 92 S. Ct. 1724, 1731 (1972), in its efforts to remedy the problem, and the resulting bounty program represents a legitimate, constitutional attempt by the State of Maryland to address a difficult situation by directing its finite resources in a manner by which she believes the maximum benefit will be derived, *Geduldig v. Aiello*, 417 U.S. 484, 496, 94 S. Ct. 2485, 2491 (1974); *Dandridge v. Williams, supra*, 397 U.S. at 479, 90 S. Ct. at 1159.

Because Alexandria does not have a constitutional right to receive price-supportive bounty payments from the State of Maryland under *any* circumstances, any limitation upon its ability to secure them cannot be deemed a deprivation of a fundamental right, much less an "invidious discrimination." Impermissible discriminations include impediments to the right to travel, the right to vote, the right of access to the courts, and rights of privacy, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974). Improper classifications are those based on alienage, nationality, and race, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848 (1971). None of these basic rights or classifications are present in this case.

Impropriety of Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if all of the pleadings and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case Appellants' affiant flatly contradicted a material statement made by Alexandria's affiant, creating a *prima facie* dispute as to a material fact. By granting summary judgment in the face of such a dispute, and where Alexandria was not entitled

to a judgment as a matter of law, the District Court committed error. Because neither requirement of Rule 56 was fulfilled, the award of summary judgment was entirely improper, and denied the Appellants due process of law.

ARGUMENT

I.

NEITHER THE COMMERCE CLAUSE NOR THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES COMPEL THE STATE OF MARYLAND TO MAKE, OUT OF STATE FUNDS, BOUNTY PAYMENTS TO NON-MARYLAND SCRAP PROCESSORS IN THE SAME MANNER OR TO THE SAME EXTENT AS SUCH PAYMENTS ARE MADE TO MARYLAND SCRAP PROCESSORS.

During its 1967 session the Maryland Legislature requested the Committee on Taxation and Fiscal Matters of the Maryland Legislative Council to review the growing problem presented by the accumulation of abandoned and discarded motor vehicles, and to propose legislation to effect a solution to this problem.[14] The Committee reported that "'[r]estoring the scrap cycle seems to be the only logical means to rid the countryside of worn-out, rusting automobile hulks,'" and that "the core of the problem was to find ways to speed up the so-called 'scrap cycle.'"[15]

> From the evidence presented to the Committee, the objective would seem to be to accelerate the movement of the vehicle from the owner who has decided to discard it, to the auto wrecker who salvages parts and markets the hulk, to the scrap processor who reduces it to scrap marketable at the

[14] The Legislature's request was made in the form of Senate Joint Resolution 57, Laws of Maryland 1967.

[15] Maryland Legislative Council Committee on Taxation and Fiscal Matters 1967 Report 60 (A. 40A).

> mills, and finally to the steel mills which convert it into new usable steel.[16]

The Committee went on to say that the optimal movement of discarded vehicles most often bogs down at the wrecker's automobile junkyard. This bottleneck develops because the most profitable part of a wrecker's operation is the sale of usable parts. Because a wrecker's profit margin in the sale of hulks to a scrap processor is so small, any obstruction tends to retard the movement of these vehicles.[17] Some of these obstructions to the free flow of automobile hulks resulted from technological advances in the steel industry which had reduced the market for the kind of scrap that comes from discarded motor vehicles, and the fact that motor vehicle titling laws, and other legal technicalities, frequently cause wreckers to hesitate handling abandoned vehicles.[18]

The Committee recognized that it actually had to address two problems: 1. abandoned motor vehicles, and 2. the accumulation of motor vehicles in junkyards. Owners of worn-out vehicles often abandoned them because it was cheaper and easier than delivering them to an auto wrecker. Wreckers tended to accumulate large numbers of abandoned vehicles in unsightly junkyards because it was a simple means of maintaining inventories of profitable parts, and because there was little, if any, financial inducement to remove the vehicles to a scrap processor.[19]

Remedial legislation was proposed as a means of tackling the problem. The Committee concluded that

[16] *Id.* (A. 40A-41A).

[17] *Id.* (A. 41A).

[18] *Id.* at 60-61 (A. 41A-42A).

[19] *Id.* at 61 (A. 42A).

auto wreckers play a vital role in the disposal of discarded motor vehicles, and that they should be encouraged to handle as many of these vehicles as possible. However, it was felt that wreckers must also be persuaded to move these vehicles into the scrap cycle as soon as practicable after salvaging usable parts.[20]

During its 1969 session the Maryland Legislature endeavored to act upon the Committee's recommendations, and addressed the problem of the proliferation of automobile junkyards by enacting Senate Bill 30, Laws of Maryland 1969, ch. 556. The resulting legislative scheme has been described in the Statement of the Case *supra*.

The rationale underlying the scheme is relatively straightforward. In order to arrest the accumulation of abandoned autos in wreckers' junkyards, wreckers are required to be licensed and are assessed $5.00 every six months for each vehicle beyond a certain age which they retain for over one year.[21] No penalty is assessed for 18 months after acquisition of a vehicle — one year plus the first six month period — in order to give the wreckers a reasonable amount of time to remove spare parts from the vehicles.[22] Wreckers are motivated to deliver abandoned vehicles to scrap processors for

[20] *Id.* at 62 (A. 43A).

[21] At the time of its original enactment the statute provided for the assessment of such vehicles seven model years or older, Code (1957, 1970 Repl. Vol.) Art. 66½, §5-203(d). In 1972 the statute was amended to impose assessments on vehicles ten model years or older, Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §5-203(d). Penalties are assessed only with respect to older vehicles because such vehicles have minimal value as sources of replacement parts.

[22] The accumulation of discarded vehicles was further discouraged by making it a misdemeanor for a wrecker to store more than 250 vehicles per acre. Code (1957, 1970 Repl. Vol.) Art. 66½, §§5-208, 5-210.

destruction through the implementation of a bounty program. Under this program the State of Maryland pays a bounty of $16.00 for the destruction of an abandoned vehicle by a scrap processor: $8.00 of this fee is paid to the scrap processor, and the other $8.00 is paid to the wrecker who delivered the vehicle to the scrapper.[23] In effect, the Maryland bounty program creates an artifical value for automobile hulks which encourages their expeditious delivery to scrap processors. "The purpose of the law . . . was to halt the growth of [the problems developing from the storage of old automobiles] and to induce recycling of vehicles which had fallen into disuse," *Administrator v. Vogt,* 267 Md. 660, 670, 299 A.2d 1, 6 (1973).

Alexandria, although a Virginia corporation, has participated in Maryland's bounty program as a licensed scrap processor since 1970. When the Maryland Legislature amended the law in 1974, only scrap processors with plants physically located and operating in Maryland were permitted to obtain inoperable eight year old vehicles, upon which bounties would be paid, if an indemnity agreement was executed in favor of the scrapper.[24] The presentation of this agreement, along with the Vehicle Identification Number, to the Motor Vehicle Administration, constitute proof that the vehicle has been destroyed, and the bounty payment is made.

[23] Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §5-205. At the inception of the program the bounty payment was in the sum of $10.00, divided evenly between wrecker and scrapper, Code (1957, 1970 Repl. Vol.) Art. 66½, §5-205. In 1972 the bounty was raised to $12.00, and in 1973 it was increased to the current $16.00 figure.

[24] Of course, non-Maryland scrappers may still receive bounties for these vehicles as long as they are documented in some permissible fashion other than by indemnity agreement.

A. *Commerce Clause*[25]

Article I, section 8, clause 3 of the Constitution, commonly known as the Commerce Clause, provides that the Congress shall have the power to regulate commerce among the several States. Generally speaking, this provision has been interpreted as prohibiting the States from placing non-incidental burdens upon interstate commerce. Under the Maryland bounty program, non-Maryland scrappers, including Alexandria, may not obtain bounties by the execution of indemnity agreements, although all other methods are available to them. In the District Court Alexandria successfully contended that this difference in the means by which scrappers may obtain vehicles eligible for bounty payments violated the Constitution of the United States.

Alexandria's complaint boils down to this. Prior to the enactment of the Maryland bounty scheme, all scrap processors were experiencing financial difficulties because of the depressed state of the scrap industry. After the implementation of the 1969 legislation, all licensed scrap processors, those within Maryland and those located near the Maryland border in contiguous States, realized a most welcome increase in revenues. When the 1974 amendment altered the scheme, in a way which, Alexandria contends, caused it to suffer a loss in receipts, Alexandria felt aggrieved.

In essence, assuming *arguendo* that Alexandria's contention concerning the effect of the 1974 amendment is accurate, until mid-1974, Alexandria had been riding

[25] Because the issues presented by this appeal are closely related and often intertwined, some of the discussion contained in the treatment of the Commerce Clause aspect of the case bears upon the Equal Protection Clause analysis, as does a measure of the material presented under Question II. *infra*.

the Maryland gravy train. Maryland is the only State in the United States which has such a bounty program, or any similar arrangement. Neither Alexandria, nor any of the other licensed non-Maryland scrap processors, pay any Maryland taxes. Neither is Alexandria registered to do business in Maryland with the Maryland Department of Assessments and Taxation, and, in fact, does not engage in any business within the State of Maryland. *See* Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss 79 (R. 197). Despite this, from the inception of the program through mid-1974, the State of Maryland was willing to liberally extend the benefits of the bounty program to non-Marylanders, presumably because the goals of the program could be best achieved if a maximum number of business enterprises participated. In 1974 the Legislature restricted the means by which non-Marylanders could take advantage of Maryland's generosity. Certainly it cannot be said that any scrap processor in the United States has a constitutional right to receive price-supportive bounty payments for scrapped motor vehicles. The validity of Alexandria's argument hinges upon implicit acknowledgement of the existence of a constituional right to these payments on Alexandria's part. Whatever Alexandria receives through Maryland's munificence cannot be regarded as anything but a fortuitous occurrence from Alexandria's viewpoint. Merely because Alexandria finds itself in a less advantageous position after a change in the law has been effected does not mean that the Constitution has been breached.

Surely such a state of affairs cannot be said to offend the Commerce Clause, for whether any State law violates that Clause depends upon whether the statute in question places an undue burden on interstate

commerce: not whether an individual business enterprise earns less income than it did before the enactment of a law. The bounty program actually *promotes* interstate commerce, and places absolutely no burden upon it.[26]

The District Court's analyses of the Commerce Clause, and the cases decided thereunder by this Court, are simply upsidedown. State statutes which have been held unconstitutional as violative of the Commerce Clause have all had one feature in common: they have *prohibited* some form or facet of interstate commerce, either by precluding such commerce outright, or by placing such a heavy burden upon some aspect of commerce that, in effect, it could not be conducted.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970), an order issued by an Arizona official which *prohibited* a California concern from transporting uncrated cantaloupes from Arizona to California was found to place an unlawful burden on interstate commerce. The Maryland bounty program imposes absolutely no prohibitions upon the interstate transportation of automobile hulks.

Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 84 S. Ct. 378 (1964), presented a situation where this Court considered a Florida law which *prohibited* Florida milk distributors from purchasing milk from non-Florida milk producers. This "*exclusion* of foreign milk from a major portion of the Florida market," was held to violate the Commerce Clause, *id.* at 377, 84 S. Ct. at 387 (emphasis supplied). The Maryland bounty statute neither prohibits nor excludes the importation or exportation of automobile hulks into or out of the State of Maryland.

[26] *See* pages 37-38 *infra*.

In *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295 (1951), a city ordinance *prohibiting* the sale of pasteurized milk not processed and bottled within a five mile radius of the city was declared unconstitutional by this Court because the ordinance *excluded* milk which was produced in Illinois from distribution in Madison, Wisconsin. The Maryland law under review does not prohibit or impede the interstate movement of any commodity.

In *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 69 S. Ct. 657 (1949), a New York law which *forbade* a milk dealer to buy from producers unless licensed to do so was struck down as violating the Commerce Clause as it was applied. The Maryland law does not forbid any scrap processor from doing business within the State. Scrappers must be licensed in order to obtain bounty payments, but the ability to receive bounty payments has nothing to do with the fundamental right of doing business.

The case of *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156 (1948), presented an extraordinary situation where a South Carolina statute required non-residents to pay a fee one hundred times as great as that paid by residents for each shrimp boat utilized within South Carolina's three mile maritime belt for the purpose of catching shrimp. Another South Carolina law required all boasts licensed to trawl for shrimp in State waters to "dock at a South Carolina port and unload, pack, and stamp their catch 'before shipping or transporting it to another State,'" *id.* at 390-91, 68 S. Ct. at 1159. This Court found that the statute which made it unlawful to unload shrimp anywhere but a South Carolina port was "inimical to the commerce clause," *id.* at 406, 68 S. Ct.

at 1167.[27] Maryland's bounty program imposes the same license fee upon all scrap processors, and does not forbid the removal of automobile hulks from the State in any manner.

The constitutionality of a portion of New York's Milk Control Act was placed before this Court in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S. Ct. 497 (1935). A segment of the Act provided for a system of minimum prices to be paid by milk dealers to producers. Conflict arose when a New York dealer purchased milk from a Vermont distributor at prices below the New York scale. At issue was whether New York could *prohibit,* within its borders, the sale of milk bought outside the State unless the price paid to the producers would have been lawful upon a like transaction within New York. Writing for a unanimous Court, Mr. Justice Cardozo stated that "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another," *id.* at 524, 55 S. Ct. at 501. Consequently, the New York statute was declared invalid. Maryland's law does not purport to prohibit the sale of scrapped cars under any circumstances, in any State, at any price.

In *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1, 49 S. Ct. 1 (1928), the State of Louisiana had, by statute, *forbidden* the exportation of shrimp from the State from which the heads and hulls had not been removed. Because this law directly obstructed and burdened interstate commerce, it could not withstand constitutional scrutiny. The closely related Louisiana Oyster Act met a similar fate in *Johnson v. Haydel,* 278 U.S. 16, 49 S. Ct. 6 (1928), for identical reasons. Maryland's bounty scheme does not regulate the exportation or importation of automobile scrap in any fashion.

[27] The foremost constitutional infirmity in *Toomer* was an impingement of the Privileges and Immunities Clause of the Constitution, U.S. Const. art. IV, §2. No such violation can be present in this case because Appellee is a corporation, and corporations are not within the protection of the Privileges and Immunities Clause, Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11, 66 S. Ct. 61, 63 (1945).

Similarly, in *Pennsylvania v. West Virginia,* 262 U.S. 553, 43 S. Ct. 658 (1923), this Court foiled an attempt by the State of West Virginia "to *compel* the retention within the state of whatever gas may be required to meet the local needs for all purposes," *id.* at 594, 43 S. Ct. at 664 (emphasis supplied). Maryland is not attempting to compel the retention of scrap metal within her borders. On the contrary, Maryland is trying to put as much scrap into the stream of interstate commerce as her limited resources will allow.

Through the enactment of the bounty program, Maryland has not endeavored to "place itself in a position of economic isolation," and the operation of the bounty statutes have not placed "an unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 527, 55 S. Ct. at 502. No prohibitions or restrictions of any sort are imposed on the interstate movement of scrap metal or automobile hulks. In fact, the Maryland scheme furtners interstate commerce. More scrap metal has undoubtedly been placed in interstate commerce since the inauguration of Maryland's program than there had been prior to its implementation. Indeed, this results from the achievement of one of the aims of the legislation.

There is a fundamental omission in the District Court's resolution of the question of how Alexandria was affected by the Maryland legislation, and whether or not any adverse effects entitled Alexandria to relief under the Constitution. Alexandria attempted to show that after the passage of the 1974 amending legislation

it was worse off financially than it had been previously. Even if this showing could be made, it would not have any constitutional impact. Alexandria's argument implicitly assumes that it was *entitled* to receive bounty payments prior to the 1974 amendment, and that any reduction in those payments resulted in injury to its financial position which could be rectified under the Constitution.

This certainly cannot be the correct method of measuring the effect of the 1974 legislation on Alexandria's business in so far as the Constitution is concerned. Rather, to determine whether or not the 1974 Maryland law had a cognizable effect on Alexandria, the proper procedure would be to measure Alexandria's situation as it existed in 1969 before *any* bounty program existed. At best, Alexandria is only *entitled* to reap whatever benefit it can derive from the free marketplace. Neither Alexandria, nor any other wrecker or scrapper, whether located within Maryland or without, is "entitled" to receive price-supportive bounty payments as a matter of right. Therefore, whether or not Maryland's scheme disrupts the natural market position to which Alexandria has a right can only be determined by comparing its post-*amendment* position with its pre-*program* predicament. When this comparison is made, the only conclusion which can be factually supported is that Alexandria is in a better position now, after the passage of the 1974 amendment, than it was before any program existed — it might have been in an even more enviable position at some other point in time, but that was a position which it enjoyed as a result of Maryland's generosity, and not as a matter of right. Because Alexandria still participates in Maryland's program, although not as actively as it once did, it continues to reap some benefits from the Maryland treasury, which is more than it received prior

to the 1969 legislation. It should not be overlooked that, even today, Alexandria can participate in Maryland's program to an unlimited extent, as long as it follows the avenues open to non-Maryland scrappers. That these procedures are not even burdensome can be distilled from the absence of any other non-Maryland scrap processors in this litigation. *See also* Affidavit of Thomas E. Harris ¶ 11 (A. 86A).

Alexandria's complaint is really that its bounty receipts have not increased by as much as it would have liked. Such a grievance may not be remedied by recourse to the Commerce Clause. For even if the bounty program indirectly affects interstate commerce, such a tenuous connection does not do violence to the Constitution, *Milk Control Board v. Eisenberg Farm Prods.*, 306 U.S. 346, 351, 59 S. Ct. 528, 530 (1939). The Commerce Clause is not offended by a State statute "which affects interstate commerce only incidentally and remotely," *Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199, 45 S. Ct. 481, 485 (1925).[28] Certainly that

[28] *See also* the *Minnesota Rate Cases*, Simon v. Shepard, 230 U.S. 352, 410-11, 33 S. Ct. 729, 745 (1913), where Mr. Justice Hughes elaborated on the general theme that the Commerce Clause is not offended by State legislation which has only incidental or tangential effects on interstate commerce.

> In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedon of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state.

Clause is not disturbed by a statutory scheme which promotes commerce among the States.

B. *Equal Protection Clause*

The District Court ruled that the Maryland statute violated the Equal Protection Clause of the fourteenth amendment because it "creates a classification which has no basis in reason." 391 F. Supp. at 58 (AJS. 22a). Appellants urge that this ruling was clearly erroneous because the Equal Protection Clause is inapplicable to the case at bar.

The Equal Protection Clause provides, in part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person *within its jurisdiction* the equal protection of the laws," U.S. Const. amend. XIV, §1 (emphasis supplied). Appellee is a corporation organized under the laws of Virginia,[29] and maintains its scrap processing facilities in Alexandria, Virginia.[30] It is not registered to do business in Maryland, does not, in fact, engage in any business in Maryland,[31] and does not pay any Maryland taxes. Simply stated, Alexandria, being a Virginian not within Maryland, is not entitled to the equal protection of Maryland's laws.

> [T]he Virginia corporation cannot rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.' . . . The Court cannot assume that those words were inserted

[29] Stipulation of Facts ¶1 (A. 58A).

[30] Stipulation of Facts ¶4 (A. 58A).

[31] Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss 79 (R. 197).

> without any object, nor is it at liberty to eliminate them from the constitution, and to interpret the clause in question as if they were not to be found in that instrument.

Blake v. McClung, 172 U.S. 239, 260-61, 19 S. Ct. 165, 173 (1898) (Harlan, J.); *see also Sully v. American Nat'l Bank*, 178 U.S. 289, 20 S. Ct. 935 (1900). "Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction," *Missouri v. Canada*, 305 U.S. 337, 350, 59 S. Ct. 232, 236 (1938). *See also Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 687 (2d Cir. 1968).

Although it is, admittedly, a point not often litigated, the "within its jurisdiction" language contained in the fourteenth amendment poses an absolute bar to Alexandria's equal protection argument. That this phrase retains operative force today cannot be doubted. *See Graham v. Richardson*, 403 U.S. 365, 371, 91 S. Ct. 1848, 1851 (1971) ("[T]he term 'person' . . . entitles both citizens and aliens to the equal protection *of the laws of the State in which they reside.*" [emphasis supplied]).

Even if this were the typical equal protection situation, where the complainant was entitled to the equal protection of the laws, the District Court's application of fourteenth amendment principles in this case was incorrect. In the proper case, when the constitutionality of a validly enacted State statute is questioned, the starting point for the resolution of the issue is always the same: the State law is presumed to be constitutional, *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 1006 (1973); *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 257, 63 S. Ct. 225, 229 (1942). An assailant attempting to overcome this presumption undertakes a most difficult

chore. He must successfully "'negative every conceivable basis which might support'" the legislative arrangement, as well as explicitly demonstrate that a classification created by the statute "'is a hostile and oppressive discrimination against particular persons,'" *Lehnhausen v. Lake Shore Auto Parts Co., supra.*

The criteria by which an allegation of constitutional infirmity encompassing the denial of the equal protection of the laws must be tested have been settled for many years. These rules are:

> 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340 (1911). This Court has repeatedly recognized the continuing validity of these propositions since their original statement in 1911, *see, e.g., Graham v. Richardson, supra,* 403 U.S. at 371, 91 S. Ct. at 1852; *Dandridge v. Williams,* 397 U.S. 471, 485-87, 90 S. Ct. 1153, 1161-62 (1970); *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S. Ct. 1101, 1105 (1961); *Morey v. Doud,* 354

U.S. 457, 463-64, 77 S. Ct. 1344, 1349 (1957); *Rast v. Van Deman & Lewis Co.,* 240 U.S. 342, 357, 36 S. Ct. 370, 374 (1916).

In 1969 the Maryland Legislature perceived that the accumulation of abandoned automobiles presented a problem of statewide proportion. Consequently, a bounty program was enacted as a major part of a larger scheme "designed to arrest the increasing accumulation of automobile hulks, and to promote their recycling," *Administrator v. Vogt, supra,* 267 Md. at 675, 299 A.2d at 9. Perhaps the legislation is not perfect, and perhaps a different form of legislation would provide a more complete solution to the problem which the Legislature sought to remedy. However, the fact that a legislative scheme is imperfect does not lead to the conclusion that it denies the equal protection of the laws.

"[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all," *Dandridge v. Williams, supra,* 397 U.S. at 486-87, 90 S. Ct. at 1162; *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489, 75 S. Ct. 461, 465 (1955). "[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose," *Nebbia v. New York,* 291 U.S. 502, 537, 54 S. Ct. 505, 516 (1934). That the constitutional limits within which State legislatures are free to act are quite broad was emphasized in *Ferguson v. Skrupa,* 372 U.S. 726, 730-31, 83 S. Ct. 1028, 1031 (1963), where Mr. Justice Black wrote the opinion for a unanimous Court:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As

> this Court stated in a unamimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [Footnotes omitted.]

Appellants maintain that Alexandria does not have a constitutional right to participate in Maryland's bounty program under *any* circumstances. However, that is not necessarily an issue presented by this case, for the effect of the Maryland law as amended is merely to limit the *means* by which scrap processors who do not operate plants located in Maryland may obtain hulks eligible for bounty payments. Only the indemnity agreement avenue is closed to non-Maryland scrappers. Other methods of acquisition remain available for use by all scrappers. Furthermore, the law places no limit of any kind upon the amount of payments which *any* scrapper may receive under the program.

Alexandria not only asserts that it has a right to participate in Maryland's program, but also claims that it can do so on its own terms. In fact, it is the State of Maryland which is distributing the benefits involved, and which has broad latitude to determine the extent, and the recipients, of the bounties, as well as the means by which the payments will be made.

With respect to satisfying the Equal Protection Clause, if indeed that Clause was applicable, the means by which Maryland's law differentiates between Maryland and non-Maryland scrap processors, need only be "rationally based and free from invidious discrimination," *Dandridge v. Williams, supra,* 397 U.S. at 487, 90 S. Ct. at 1162. As long as its "judgments are rational, and not invidious," the Maryland Legislature's efforts to tackle the problem posed by the accumulation of automobile hulks "are not subject to a constitutional straightjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them," *Jefferson v. Hackney,* 406 U.S. 535, 546-47, 92 S. Ct. 1724, 1731 (1972).

"A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *McGowan v. Maryland, supra,* 366 U.S. at 426, 81 S. Ct. at 1105; *Dandridge v. Williams, supra,* 397 U.S. at 485, 90 S. Ct. at 1161. Many logical reasons exist for the distinction in the Maryland law. By not allowing non-Maryland scrappers to acquire autos by executing an indemnity agreement at least four purposes are achieved: 1. It tends to insure that bounty recipients are amenable to judicial process in Maryland; 2. It insures that the indemnity agreement is enforceable; 3. It tends to insure that bounty payments will only be made on autos abandoned in Maryland; and, 4. It tends to limit the amount of money which the State obligates itself to pay out of its limited resources to non-taxpayers.

These reasons may not be exhaustive, nor may they be logically perfect. However, they are certainly sufficient to pass muster under the Equal Protection Clause. All the reasons which the State might advance

in justification of the statutory distinction need not be explored, so long as a "solid foundation" for the law "can be found in the State's legitimate interest in encouraging" the removal of abandoned automobiles from its highways and junkyards, *Dandridge v. Williams, supra,* 397 U.S. at 486, 90 S. Ct. at 1162. Nothing in the Constitution requires the State of Maryland "to subordinate or compromise its legitimate interests solely to create a more comprehensive" bounty program than it already has, *Geduldig v. Aiello,* 417 U.S. 484, 496, 94 S. Ct. 2485, 2491 (1974).

The other hurdle which the Maryland statute must clear in order to satisfy equal protection guarantees is that it not discriminate invidiously. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination," *Williamson v. Lee Optical of Oklahoma, supra,* 348 U.S. at 489, 75 S. Ct. at 465, because "it is only 'invidious discrimination' which offends the Constitution," *Ferguson v. Skrupa, supra,* 372 U.S. at 732, 83 S. Ct. at 1032.

A limitation upon one's ability to secure bounty payments for destroying junked automobiles to as great an extent as that possessed by another is certainly not a deprivation of any fundamental right, and has never been deemed an "invidious discrimination." Examples of such improper discriminations were set forth in *Village of Belle Terre v. Boraas,* 416 U.S. 1, 7, 94 S. Ct. 1536, 1540 (1974), and include: the right to travel, the right to vote, the right of association, the right of access to the courts, and rights of privacy. Other impermissible classifications are those based on alienage, nationality, and race, *Graham v. Richardson, supra,* 403 U.S. at 372, 91 S. Ct. at 1852. None of these classifications or fundamental rights are involved in this case.

Alexandria does not have a constitutional right to participate in Maryland's bounty scheme. To the extent that it does participate it does so only to the degree which the Maryland Legislature has provided by statute. This is particularly true here where the Legislature has not limited the extent of Alexandria's participation in the program, but only the means by which it may partake of the benefits. In fact, Alexandria can only benefit from the present statutory scheme: it is not subject to any of the non-bounty aspects of the Maryland program which are enforced by the imposition of various sanctions. The State of Maryland certainly could not enforce an assessment against a non-Maryland concern for retaining old vehicles for more than eighteen months. Nor could it charge a Virginian with a misdemeanor for storing too many cars within a defined area in Virginia.[32] Surely Maryland "has no power to project its legislation into" Virginia, or any other State, *Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 521, 55 S. Ct. at 499. "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory," and "the laws of one State have no operation outside of its territory, except so far as is allowed by comity," *Pennoyer v. Neff,* 95 U.S. 714, 722 (1877). Therefore, Maryland has no obligation under the Equal Protection Clause to extend the benefits of its legislation to non-Marylanders for the same reason that it may not enforce any obligations imposed by its laws beyond its jurisdiction.

This is not a case such as *Morey v. Doud, supra,* 354 U.S. at 467, 77 S. Ct. at 1351, where a State has singled out one of its residents for, when compared with other residents of the same class, special treatment. As was the case in *Dandridge v. Williams, supra,* 397 U.S. at

[32] See notes 21 and 22 *supra* and accompanying text.

479, 90 S. Ct. at 1159, Maryland has finite resources, and an obvious interest in distributing the available resources in the manner in which she perceives the most benefit will be derived, *Geduldig v. Aiello, supra,* 417 U.S. at 496, 94 S. Ct. at 2491. Whether or not one agrees with Maryland's determination of how these resources should be distributed, "there is nothing in the Constitution that forbids it," *Jefferson v. Hackney, supra,* 406 U.S. at 549, 92 S. Ct. at 1733.

Alexandria does not have a cognizable constitutional claim solely by virtue of the fact that it might not be making as much money now as it was at some time in the past. "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases," *Nebbia v. New York, supra,* 291 U.S. at 527-28, 54 S. Ct. at 512. Nor does the fourteenth amendment "protect a business against the hazards of competition," *Hegeman Farms Corp. v. Baldwin,* 293 U.S. 163, 170, 55 S. Ct. 7, 9 (1934). The Constitution would even permit the State of Maryland to enter into the scrapping business and thereby directly compete with private proprietors, *Nebbia v. New York, supra,* 291 U.S. at 529-30, 54 S. Ct. at 513.

If Alexandria believes that price-supportive bounty payments are essential to its survival, its proper redress is not to be found with the courts, but rather with the legislature — and the appropriate legislature in this case is that sitting in Richmond, Virginia, and not that body which deliberates in Annapolis, Maryland. *See Baldwin v. G.A.F. Seelig, Inc., supra,* 294 U.S. at 524, 55 S. Ct. at 501. Virginia is more than four times as large as Maryland, and is populated by over 20% more people, 1975 Information Please Almanac 633, 644, 699 (1974). Surely the Commonwealth of Virginia is in a position to establish its own bounty program if it so desires, and

her citizens need not depend upon the treasuries of other States for sustenance. It is that Commonwealth, from which Alexandria derives its existence, to which it presumably pays its taxes, and under whose laws it is entitled to equal treatment, which is in the position to provide the relief which Alexandria would have.

II.

APPELLANTS WERE DENIED DUE PROCESS OF LAW BECAUSE MATERIAL FACTS WERE IN DISPUTE AND THE DISTRICT COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEE.

Although Appellants believe that, as a matter of law, Alexandria may not successfully press its constitutional claims, the unusual procedural handling of this case by the District Court also deserves this Court's attention. It is Appellant's position that the grant of summary judgment for Alexandria was improper, and resulted from a misapplication of the Federal Rules of Civil Procedure. This, in turn, led the Court to apply improper standards in the course of determining the merits of the controversy.

Prior to the designation of the three-judge court the single Judge to whom the case was originally assigned requested that the parties submit affidavits concerning the facts in the case in order that the need for an evidentiary hearing could be obviated. Pursuant to the Judge's request, Alexandria submitted an affidavit of Isadore Gittleson, Alexandria's General Manager and Assistant Treasurer. Shortly thereafter, the State of Maryland filed the affidavit of Thomas E. Harris, Chief of the Licensing and Consumer Services Division of the Motor Vehicle Administration of the Maryland Department of Transportation. Mr. Harris administers Maryland's bounty program.

In the course of attempting to demonstrate how Alexandria was adversely affected by the 1974 Maryland legislation, Mr. Gittleson made numerous allegations concerning the number of automobile hulks for which Alexandria claimed bounties. Mr. Gittleson explained the method by which Alexandria tabulated the figures on hulks received under indemnity agreements: "Those indemnity agreements submitted for a bounty payment to the Maryland Motor Vehicle Administration, and accounted for on the data processing printout received monthly from that Administration, were all deemed to have been submitted for vehicles coming from Maryland, since *no such agreement is submitted to the Motor Vehicle Administration unless the tower executing it is known to customarily haul from Maryland,*" Gittleson Affidavit ¶5 (A. 75A-76A) (emphasis supplied).

In his affidavit Mr. Harris noted that the Motor Vehicle Administration (MVA) operated on the premise that the 1974 legislation restricted bounty payments to be made only on cars abandoned in Maryland, Harris Affidavit ¶4 (A. 84A-85A). Mr. Harris stated that:

> *Contrary to the assertion made by Mr. Isadore Gittleson in paragraph five of his Affidavit . . .* prior to the effective date of [the 1974 legislation, Alexandria] submitted in connection with claims for bounty payments a number of indemnity agreements which indicated that the origin of the vehicle was the Police Department of the District of Columbia.

Harris Affidavit ¶5 (emphasis supplied) (A. 85A).

Mr. Harris made further recitals which directly placed the accuracy of Mr. Gittleson's figures in doubt. Mr. Harris averred that it was the practice of scrap processors to require their sources of hulks to detach the

Vehicle Identification Number Plate (VIN Plate)[33] prior to the vehicle's arrival at the scrapper's place of business, and then present this VIN Plate to MVA, with the appropriate documentation, when bounty payment was sought on a vehicle. As a result of this practice Mr. Harris swore that, on at least two occasions prior to the effective date of the legislation, Alexandria had presented a claim for bounty payment for a vehicle which another scrapper had previously certified as having been destroyed! Because it was not until July 1, 1974, that MVA developed the computer capability to compare vehicle destruction reports, it had been possible for Alexandria to claim bounties for vehicles abandoned outside of Maryland if they had been received accompanied by the VIN Plates of vehicles which had previously been titled in Maryland. Harris Affidavit ¶¶7-9 (A. 85A-86A).

Because, along with a Stipulation of Facts, these affidavits were the only evidence before the District Court, there existed a clear dispute over material facts. The District Court recognized this discrepancy, but ignored it. The Court noted "that the factual positions of the parties differ in some respects," but opined that "the unconverted facts" entitled Alexandria to summary judgment. 391 F. Supp. at 48 (AJS. 3a). More revealing is the Court's statement about the quality of Mr. Harris' affidavit:

> defendants have not proffered a scintilla of factual support for their assumption that non-resident

[33] Code (1957, 1970 Repl. Vol., 1975 Cum. Supp.) Art. 66½, §11-1002.2(f)(5), provides that, in cases where a bounty is claimed by the submission of an indemnity agreement, the manufacturer's serial number or identification number shall be satisfactory proof, along with the indemnity agreement, that the vehicle has been destroyed. This number appears on a VIN Plate.

> processors are more likely than in-state processors to claim bounties for vehicles abandoned outside of Maryland. Although defendants *have suggested* that plaintiff has submitted to the MVA several indemnity agreements indicating the origin of a destroyed vehicle to have been the District of Columbia . . . .

391 F. Supp. at 57 (AJS. 20a) (emphasis supplied).

There were only three documents placed in evidence in this case: a Stipulation of Facts, and two affidavits. Yet the District Court deemed a sworn statement made in one of those affidavits to have been merely a *suggestion,* presumably to lend credence to the Court's preceding claim that defendants had "not proffered a scintilla of factual support" for the contention that limiting bounty payment to Maryland scrappers tended to insure that the vehicles for which bounties were claimed had been abandoned in Maryland. In fact, Appellants *had* offered this proof in the form of a sworn affidavit, but the Court sloughed this off as only a "suggestion." The Court should not have degraded the veracity of a sworn affidavit, particularly where the affiant was not testifying in open court, and thus his demeanor could not be observed.

In support of Mr. Harris' statement that Alexandria had been submitting bounty claims for cars which had been abandoned outside of Maryland, Appellants produced 56 indemnity agreements submitted by Alexandria to MVA, for vehicles delivered during March, 1974, which indicated the source of these autos to be the District of Columbia Police Department. This bulky packet of agreements was not appended to the Harris Affidavit — although copies were presented to Alexandria — because Appellants saw nothing to be gained by so doing. Mr. Harris had directly contra-

dicted a statement made in Mr. Gittleson's affidavit, and Appellants believed, and still contend, that this created a *prima facie* dispute over a material fact which should have necessitated an evidentiary hearing. At such a hearing the introduction of the 56 agreements, and similar ones from other months, would have been proper to resolve the competing contentions. As it happened, the Harris affidavit was the last of the three documents to be submitted to the District Court, and, therefore, nothing at all was before the Court which even purported to refute Mr. Harris' statement.

These evidentiary difficulties are most significant with respect to the Commerce Clause aspect of this case. Alexandria had the burden of showing that Maryland's bounty scheme placed an undue burden on interstate commerce. The conflicting evidence concerned one facet of that question: How much of a burden was Alexandria forced to bear as a result of the 1974 legislation? For example, was there actually a decrease in the number of vehicle hulks leaving Maryland and entering Virginia? If so, was that decrease significant? Certainly if the number of scrapped automobiles coming out of Maryland was insubstantially reduced there could be no burden placed on interstate commerce.

Moreover, at a full evidentiary hearing this would have been only one aspect of the broader issue presented by Alexandria's Commerce Clause challenge. For, in order to prevail, Alexandria would have had to show that Maryland's program placed an undue burden on interstate commerce — *not* simply that a burden was imposed on the Alexandria Scrap Corporation. Commerce between Maryland wreckers and Alexandria, or even all commerce between Maryland and the Commonwealth of Virginia, is only one component of interstate

commerce. In order to ascertain the effect of Maryland's program, interstate commerce *as a whole* must be examined.

Indeed, it is Appellant's contention that the Maryland bounty program is a boon to interstate commerce whether or not the Alexandria Scrap Corporation finds itself disadvantaged. The program, since its institution, has unquestionably led to more scrap metal being placed in the flow of commerce then was the case before its enactment. This stream of commerce includes the greater amounts of scrap metal shipped to steel mills in Pennsylvania and Maryland, and to other States in which steel is manufactured. In turn this has provided more steel for the production of new automobiles in Michigan, and structural steel for use in all States. All of the specific consequences of Maryland's program cannot, of course, be enumerated here. However, had Appellants been accorded the opportunity to present this evidence, the District Court would have at least applied the correct Commerce Clause standard to this case: what was the effect of the Maryland law on the *totality* of interstate commerce, rather than its effect on only one minute component of that commercial exchange.

Furthermore, the District Court itself found that the extent of the injury claimed to have been suffered by Alexandria had not been established when it wrote:

> While, in the current summary judgment posture of this case, the extent to which old cars constitute the lifeblood of the scrap metal industry and the exact percentage of ferrous scrap sold to steel mills represented by vehicles eight years old or older *have not been established,* the importance of such vehicles to the scrap industry is without doubt substantial.

391 F. Supp. at 62 (AJS. 29a) (emphasis supplied). The Court is saying that the extent of the injury claimed to have been suffered by Alexandria has "not been established." No matter what measure of damage one might employ to determine the precise effect of the 1974 amendment on Alexandria, there is no doubt that the foremost issue is whether an undue burden has been imposed on interstate commerce by the Maryland legislation. It is impossible to determine whether that burden is "undue" unless that burden is measured, and yet, here the Court notes that although the burden has not been established, that burden is "without doubt substantial." Thus, the District Court somehow devined a conclusion which disposed of the ultimate issue in the case, while acknowledging that Alexandria had not established the extent of the damage purported to have been wrought by the 1974 amendment.

The above excerpt from the District Court's opinion is also revealing in another respect. The Court seems to imply that because of "the summary judgment posture of this case," the fact that nothing definite has been established is of little, if any, moment. This seems to say that the burden of proof in summary judgment settings is somewhat less rigorous than it is in cases where evidentiary hearings are held. Nothing could be further from the truth. The standard for granting summary judgment demands a much stronger showing than that required for judgment after a full trial.

In this case, Alexandria filed a complaint which Appellants then moved to dismiss. The Court — not yet a three-judge court — then requested that each party submit an affidavit. These were submitted and received, and, by operation of Rule 12(b) of the Federal Rules of Civil Procedure, Appellant's motion to dismiss was

transformed into a motion for summary judgment, which, in turn, automatically raised a cross-motion for summary judgment by Alexandria.[34]

Rule 12(b) states that such motions must be disposed of in accordance with Rule 56. Rule 56 provides that summary judgment shall be rendered if all of the pleadings and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Manifestly, Alexandria did not sustain the burden of showing that it was entitled to summary judgment.

> [Rule 56] authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial . . . .'

Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 488 (1962); *see also Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S. Ct. 724, 728 (1944). As has been demonstrated a dispute over a genuine issue certainly did exist. This is especially evident when it is recognized that "'[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion,'" *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609 (1970). With respect to Alexandria's motion for summary judgment, when Appellants' evidentiary offerings are examined in the light most favorable to them, the

[34] An examination of the first few pages of the transcript of the hearing will readily reveal that everyone, including the members of the Court, was unsure of the procedural posture of the case. At first neither counsel believed that summary judgment motions were before the Court. Transcript of Proceedings 2-7 (A. 92A-96A).

existence of a dispute over a genuine issue cannot be denied.

The procedural handling of this case in the District Court was most likely the result of a desire to save time by disposing of this case without an evidentiary hearing. Whatever may be the advantages of conserving valuable judicial time, the most expeditious route cannot be followed where it leads to a denial of due process of law to one of the parties. The Rule 12(b) provision providing for the automatic conversion of some motions to dismiss into summary judgment motions presents an enticing alternative to the rigors of a full hearing. However, it is a lure which must be resisted when summary judgment would be inappropriate. "Under this rule, *bona fide* factual disputes may not be disposed of through the use of affidavits, and the rule cannot be used as a substitute for a trial of the case," *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708, 711 (10th Cir. 1970); *Eagle v. Louisiana & Southern Life Ins. Co.*, 464 F.2d 607, 608 (10th Cir. 1972). Disposing of factual disputes without according the parties an opportunity to be fully heard amounts to a denial of due process of law.

Judging from the amount of recent litigation in the United States Courts of Appeals, it appears that Rule 56 is increasingly being abused. In response to this practice the Circuit Courts have been unanimous in deploring trials by affidavit under the guise of motions for summary judgment. "Summary judgment is not to be a trial by affidavit," *Gutor International AG v. Raymond Packer Co.*, 493 F.2d 938, 944 (1st Cir. 1974). *See also Walgren v. Howes*, 482 F.2d 95, 98 (1st Cir. 1973); *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.*, 479 F.2d 135, 138 (5th Cir. 1973); *Zahora v. Harnischfeger Corp.*, 404 F.2d 172, 175 (7th Cir. 1968);

Champlin v. Oklahoma Furniture Mfg. Co., 269 F.2d 918, 922 (10th Cir. 1959).

Furthermore, in order to satisfy Rule 56, Alexandria *also* had to have been entitled to judgment as a matter of law. That Alexandria was not so entitled has been set forth in the Commerce Clause and Equal Protection Clause portion of this Brief. For these reasons, Appellants were denied due process of law when the District Court granted summary judgment for Alexandria.

It is axiomatic that no court should ever decide a constitutional issue if the matter before it can be disposed of on other than constitutional grounds. In the context of three-judge courts faced with constitutional challenges to State statutes, the importance of full evidentiary hearings is particularly crucial. Such courts must be especially careful not to dispose of constitutional questions prematurely for at least two additional reasons: 1. The party who is unsuccessful before a three-judge court is never assured of complete appellate review because of the relatively few appeals which this Court decides on the basis of full briefs and oral argument; and, 2. The number of direct appeals from decisions of three-judge courts to this Court would be reduced. As occurred in this case, the three-judge court reached a constitutional question which it very well might have avoided had a complete hearing been conducted. With the number of direct appeals increasing at such a rate that a serious overcrowded docket problem exists in this Court today, the necessity for encouraging exacting procedures in the district courts has been enhanced.

CONCLUSION

For the reasons expressed above, the Appellants, defendants below, were entitled to judgment as a matter of law. Accordingly, the decision of the District Court must be reversed, and judgment entered for the Appellants.

Respectfully submitted,

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November 1975